PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T CORP.,	)	
	)	Docket No. 17-56
Complainant	)	
	)	Bureau ID No. EB-07-MD-001
vs.	)	
	)	
IOWA NETWORK SERVICES, INC., d/b/a AUREON NETWORK SERVICES	)	
	)	
Defendant.	)	

INITIAL BRIEF OF IOWA NETWORK SERVICES, INC.
d/b/a AUREON NETWORK SERVICES

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August 21, 2017

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Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), by its undersigned attorneys, and pursuant to the FCC's July 25, 2017 status conference letter ruling and August 14, 2017 Order issued in the above-captioned proceeding, files its initial brief.

I. AT&T Response to Aureon Interrogatory No. 4 Shows that AT&T has Violated the Communications Act by Failing to Pay the Undisputed Portion of Aureon's Invoices.

All interexchange carriers, including AT&T, have an obligation under Section 201(a) of the Communications Act ("Act")[1] to pay other carriers for routing their traffic over a through route like the CEA network. To that end, the FCC established a comprehensive mechanism for carriers to recover the costs associated with their provision of access services required to complete calls.[2]

[1] 47 U.S.C. § 201(a).

[2] *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C. 2d 241 (1983) ("*Access Charge Order*"), *modified*, 97 F.C.C. 2d 682 (1983) ("*Reconsideration Order*"), *further modified*, 97 F.C.C. 2d 834 (1984) ("*Second Reconsideration Order*"), *aff'd in principal part and remanded in part sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

When the FCC first established access charges, it called them "carrier's carrier charges," not charges to a customer.[3] More recently, the FCC refers to this compensation between carriers as "intercarrier compensation."[4]

In this proceeding, Aureon issued Interrogatory No. 4 to AT&T requesting information regarding AT&T's payments of Aureon's invoices for traffic that AT&T routed over Aureon's centralized equal access ("CEA") network that originated from or terminated to the facilities of eight local exchange carriers ("LECs"). In AT&T's supplemental response to Interrogatory No. 4, AT&T admitted for the first time that it has withheld payments to Aureon on all minutes for AT&T's traffic originating from or terminating to the facilities of seven local exchange carriers subtending Aureon's access tandem. Specifically, AT&T admitted, in relevant part:

> [O]nce AT&T determined that a CLEC was engaged in access stimulation and decided to withhold payment, it has withheld payments to INS on all minutes directed to those CLECs.
>
> AT&T began withholding payment from INS on all minutes delivered to Great Lakes in September 2013, and has continued to withhold payment on all such minutes billed from that time until the present. In April 2016, AT&T began withholding payment from INS on all minutes delivered to BTC and Omnitel, and has continued to withhold payment on all such minutes billed from that time until the present. In June 2016, AT&T began withholding payment from INS on all minutes delivered to Premier, Louisa, Goldfield and Interstate, and has continued to withhold payment on all such minutes billed from that time until the present.[5]

AT&T admitted that it has paid zero for both non-access stimulation traffic and access stimulation traffic directed to those LECs. AT&T did not pay the undisputed amount for non-access

[3] *See, e.g.*, *Access Charge Order*, 93 F.C.C. 2d at 242.

[4] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4688-89, ¶ 6, n.13 (2005) ("Although the access charge regime adopted in 1983 and contained in the Commission's Part 69 access charge rules includes charges that LECs impose on their subscribers, in this item we generally use the term 'access charges' to mean charges imposed by a LEC on another carrier.").

[5] *See* Aureon Exhibit 66, attached hereto.

stimulation traffic at the rate AT&T contends is applicable, i.e., the Connect America rate cap. Although AT&T admits that access stimulation is inapplicable to originating traffic, AT&T has not paid Aureon for the CEA service provided for traffic originating from the facilities of seven LECs subtending Aureon's access tandem.[6] AT&T also did not pay the undisputed amount for access stimulation traffic, which according to AT&T's arguments would have been the CenturyLink rates.

AT&T violated the Communications Act by failing to pay the undisputed amount for traffic originating or terminating to the facilities of those LECs. The Fifth Circuit recently ruled that an interexchange carrier's failure to pay the undisputed amounts for switched access service is an unreasonable practice that violates Section 201(b) of the Act. *See CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., L.P.*, 861 F.3d 566, 577-78 (5th Cir. 2017), *reh'g denied* (5th Cir. Aug. 1, 2017).

Due to AT&T's unlawful conduct, Aureon has received a rate of zero for the vast majority of traffic on the CEA network. AT&T's traffic comprised approximately 75% of all the traffic that is carried by the CEA network,[7] and AT&T has argued that most of that traffic is associated with the seven LECs identified in AT&T's response to Aureon Interrogatory No. 4. AT&T's supplemental response to Aureon Interrogatory No. 4 confirms that Aureon has received zero payments from AT&T for most CEA traffic. If a rate of zero is applied to most CEA minutes-of-use, then it stands to reason that there are fewer minutes left to recover the CEA revenue requirement, which in turn places upward pressure on the CEA tariff rate paid by other

[6] *See* Supplemental Declaration of Frank Hilton, attached hereto as Exhibit 75. Attachment 1 attached thereto showing the amounts that AT&T has not paid for originating minutes-of-use from the seven LECs identified in AT&T's response to Aureon Interrogatory No. 4.

[7] Declaration of Frank Hilton ¶¶ 14, 22, attached as Exhibit B to Aureon's Answer.

interexchange carriers. In order to provide the full guidance sought by the federal district court through this primary jurisdiction referral, Aureon respectfully requests that the Commission confirm that AT&T's failure to pay the undisputed portions of Aureon's invoices for CEA service provided for AT&T's traffic that originated from or terminated to the facilities of the seven LECs identified in Aureon Interrogatory No. 4 is an unreasonable practice that violates Section 201(b) of the Act.[8]

II. The Rates Charged by Aureon's IXC Division to the Access Division are Reasonable, and Fully Comply with the FCC's Rules.

A. FCC Rules on Intracompany Transactions

As explained in Aureon's Legal Analysis, the FCC's *Fifth Report and Order* in the Competitive Common Carrier Services proceeding[9] prohibited Aureon's Access Division from jointly owning the transmission and switching facilities with Aureon's IXC Division.[10] In order to comply with the *Fifth Report and Order*, Aureon created separate corporate divisions which facilitated access services (i.e., the Access Division), and competitive services (i.e., the IXC Division).[11] As approved by the FCC,[12] the IXC Division leases circuits to the Access Division so that the Access Division can provide CEA service to interexchange carriers.

Section 32.27(c) of the FCC's rules sets forth five categories of service between a carrier and its affiliate, and how those services are to be recorded: (1) tariffed services are to be recorded

[8] *CenturyTel v. Sprint*, 861 F.3d at 578 (recognizing that "the FCC has not squarely addressed" such "improper 'self-help'").

[9] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 F.C.C.2d 1191 (1984) ("*Fifth Report and Order*").

[10] Aureon Legal Analysis at 42.

[11] *Id.*

[12] *See id.*

at the tariff rate; (2) non-tariffed services pursuant to publicly-filed agreements submitted to a state commission are to be recorded using the charges appearing in those agreements; (3) non-tariffed services provided between a carrier and its affiliate that qualify for prevailing price valuation are to be recorded at the prevailing price; and (4) all other service provided by a carrier to its affiliate are to be recorded at no less than the higher of fair market value and fully distributed cost; and (5) all other services provided to a carrier by its affiliate are to be recorded at no more than the lower of fair market value and fully distributed cost.[13]

The first three categories do not apply to the circuits leased by the IXC Division to the Access Division because those circuits are not provided pursuant to a tariff or an agreement filed with a state commission, and the lease does not qualify for prevailing price valuation[14] because the lease of circuits to access the more than 2,700 mile fiber network is not provided to third parties. The fourth category does not apply because the lease of circuits is not "by a carrier to its affiliate," i.e., not by the Access Division to the IXC Division. The fifth category does apply because the lease is for service "to a carrier by its affiliate," i.e., to the Access Division by the IXC Division. Accordingly, the IXC Division's lease rates must be recorded at no more than the lower of fair market value and fully distributed cost.

As further discussed below, the rates charged by the IXC Division for circuits leased to the Access Division were below the rates required to recover the IXC Division's fully distributed costs and fair market value. Therefore, the lease costs included in the Access Division's revenue requirement are reasonable, and there has been no cross-subsidization of the IXC Division by the Access Division.

[13] 47 C.F.R. § 32.27(c).

[14] *See id.* at § 32.27(d) (applicability of rules for prevailing price valuation).

B. The IXC Division's Lease Rates Recover Less than its Fully Distributed Costs.

During discovery, Aureon produced information to AT&T in response to various interrogatories regarding, among other things, the Access Division's tariff review plan filings, cost support, and lease rates charged by the IXC Division to the Access Division. In response to AT&T Interrogatory Nos. 5 and 6, Aureon produced in PDF and native Excel format copies of spreadsheets that detailed the backup materials that Aureon relied upon for its tariff filings made with the FCC in 2010, 2012, 2013, 2014, and 2016.[15] Furthermore, in response to AT&T Interrogatory Nos. 7 and 12, Aureon produced additional data used to derive the information set forth in Table 1 of Jeff Schill's declaration. Aureon also produced a narrative explanation in response to AT&T Interrogatory Nos. 7 and 13 detailing the lease rates charged by the IXC Division to the Access Division, and the methodology utilized to calculate the data in Table 1.[16]

The Access Division's network lease costs are periodically tested for reasonableness based on an analysis of costs derived from the IXC Division.[17] The Lease Calculation Exhibit explains in detail the methodology used to determine whether the lease rate charged by the IXC Division to the Access Division was reasonable and in compliance with Section 32.27(c). The rates in the last column of Table 1 ("Equivalent Cost per DS-0 Mile") show the IXC Division's fully distributed cost per DS-0 mile,[18] which constitute the "reasonableness test" (the "Reasonableness

[15] Copies of those spreadsheets (Aureon Bates Nos. Aureon_01342 – Aureon_02711) are attached hereto as Aureon Exhibit 70 ("Fair Market Value Analysis"). Native Excel versions of the spreadsheets are being provided to staff.

[16] *See* Aureon Exhibit 67, attached hereto. Exhibit 67 is referred to herein as the "Lease Calculation Exhibit." Relevant pages from NECA Tariff F.C.C. No. 5 discussed in the Lease Calculation Exhibit are attached hereto as Exhibit 68. The Excel spreadsheet excerpts discussed in the Lease Calculation Exhibit are attached hereto as Exhibit 69.

[17] Aureon Legal Analysis at 48.

[18] *See* Exhibit 67 at 1.

Test Rate") used by Aureon to determine if the lease rates charged by the IXC Division to the Access Division were appropriate.[19] Since the inception of these two divisions, the lease rate that the IXC Division charges the Access Division has always been set at a rate per DS-0 mile. Consistent with Section 32.27(c), if the rate charged by the IXC Division to the Access Division is less than the Reasonableness Test Rate, then that shows that there is no cross-subsidization occurring because the IXC Division would be recovering less than what it costs to provide service to the Access Division.[20] However, if the rate charged by the IXC Division to the Access Division is more than the Reasonableness Test Rate, then that indicates that there is cross-subsidization occurring because the IXC Division would be recovering more than what it costs to provide service to the Access Division.[21] Thus, the rate charged by the IXC Division to the Access Division is reasonable, and complies with the "less than" fully distributed cost requirement in Section 32.27(c) for intracompany service transactions, if the rate charged by the IXC Division to the Access Division is less than the rate set forth in the Equivalent Cost per DS-0 Mile column. That column shows the IXC Division's cost of providing circuits to the Access Division on a fully distributed cost basis, for the applicable year.

The chart below shows a side-by-side comparison of the lease rates charged by the IXC Division to the Access Division, and the Reasonableness Test Rate from Table 1 of Jeff Schill's Declaration for the applicable year:

[19] *Id.*

[20] *Id.*

[21] *Id.*

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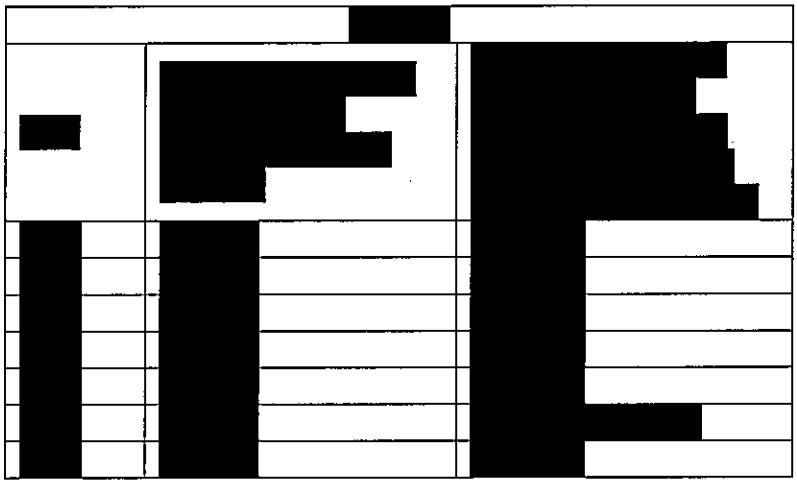

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As shown in Chart 1, the DS-0 lease rate charged by the IXC Division to the Access Division was below the Reasonableness Test Rate.

During the deposition of Jeff Schill, AT&T asked whether the lease rate charged by the IXC Division to the Access Division was a market rate developed by utilizing fully distributed costs, and Mr. Schill stated that it was not.[22] Rather, the lease rate was set by management to be less than the IXC Division's Reasonableness test rate, i.e., below fully distributed costs.[23] Mr. Schill confirmed that the last column on Table 1, which is reproduced in the last column of Chart 1 above, was used to determine whether the lease rate charged by the IXC Division to the Access Division was reasonable.[24] Mr. Schill also stated that if the IXC Division had been charging a lease rate to the Access Division that was more than the IXC Division's fully distributed

[22] Deposition of Jeff Schill ("Schill Dep.") 30:23 – 31:13. Relevant extracts from Mr. Schill's deposition are attached hereto as Exhibit 71.

[23] *Id.* 36:15 – 37:5; 41:17 – 41:23.

[24] *Id.* 40:4 – 42:25.

costs, the company's cost consultants would have alerted Aureon so that the lease rate could be adjusted as necessary to comply with Section 32.27(c).[25]

Accordingly, the rate booked for the service provided by the IXC Division to the Access Division was lower than the rate required to recover the IXC Division's fully distributed costs for that service, and complied with the requirement in Section 32.27(c) that the rate booked for service provided to a carrier by its affiliate be no more than the affiliate's fully distributed costs.

C. The IXC Division's Lease Rates are Less than the Fair Market Value for Comparable Service.

The other requirement in Section 32.2(c) for intracompany transactions is that the rate charged by the IXC Division to the Access Division must be less than "fair market value." Aureon's outside accounting consultants performed an analysis in July 2017 to determine whether the IXC Division's rates were lower than the fair market value for comparable service. That analysis is attached hereto as Exhibit 72 (Bates Nos. Aureon_02746 – Aureon_02751). There are no readily available rates for comparable service to develop a fair market value rate because the IXC Division does not provide service to third parties to access the more than 2,700 mile CEA fiber network.[26] The Access Division is the only customer for that service. Accordingly, the outside accountants determined that it was appropriate to use rates contained in NECA Tariff F.C.C. No. 5[27] to determine the fair market value of the IXC Division's service because that tariff contains rates for access service for numerous rural areas,[28] and the rates for many of the LECs

[25] *Id*. 42:19 – 43:11.

[26] Schill Dep. 184:14 – 185:25 (CEA service is different than access service provided by LECs, and provides more capabilities).

[27] *See* Exhibit 68, for relevant pages of NECA Tariff F.C.C. No. 5 discussed in the Lease Calculation Exhibit.

[28] Schill Dep. 189:23 – 190:5; 191:13 – 191:25.

subtending Aureon's tandem are contained in the NECA tariff. As Mr. Schill testified during his deposition, the NECA rates are not an exact match for CEA service, but are the most comparable rates offered by third parties that are available.[29]

To determine the fair market value for the IXC Division's service, the outside accountants first determined the rate band applicable to the study areas for each LEC listed in the Access Division's tariff, and then calculated the average rate band for the LECs.[30] If a rate band could not be determined for a LEC, that LEC was not included in the average rate band calculation.[31] As further detailed in the Lease Calculation Exhibit, the outside accountants conducted the fair market value analysis for DS-0 and DS-1 circuits for Rate Bands 6 and 28, i.e., the lowest rates and the average rates, to determine if the IXC Division's lease rates were reasonable. The fair market value of the cost per DS-0 mile was then compared to the IXC's lease rates used to allocate costs to the Access Division. The chart below summarizes the results of the fair market value analysis:

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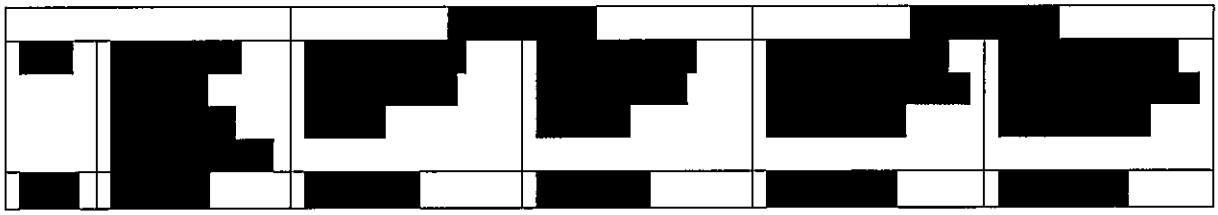

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A fair market value analysis was only performed for 2017. That analysis shows that the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** lease

[29] *See* Schill Dep. 183:3-186:25.

[30] Lease Calculation Exhibit, Exh. 67 at 6.

[31] *Id.*

rate charged by the IXC Division to the Access Division was **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** than the fair market value for DS-0 service factored down from the DS-1 level. Regardless of whether the rate for the IXC Division's service is compared to the fair market value of DS-0 or DS-1 service in the most expensive rate band (Rate Band 6) or the average rate band (Rate Band 28) for LECs that subtend Aureon's CEA network, the IXC Division's rate charged to the Access Division was less than fair market value. The outside accountant's analysis verified that the IXC Division's lease rate was less than the fair market value of DS-0 service in Rate Bands 6 or 28, and the fair market value of DS-1 service factored down to the DS-0 level for those rate bands. Accordingly, the IXC Division's lease rate used to allocate costs to the Access Division complied with the requirement in Section 32.27(c) that the rate for service provided to a carrier by its affiliate be no more than the fair market value for that service.

III. It was Appropriate and Consistent with Generally Accepted Accounting Principles to Include Uncollectible Amounts in the Access Division's Revenue Requirement.

During discovery, Aureon produced cost support information showing how uncollectible amounts were accounted for in Aureon's tariff filings.[32] It was appropriate for Aureon to record uncollectible amounts as part of its costs. There are two ways to record uncollectible amounts (bad debts).[33] The first method is referred to as the "Direct Write-off" method, and the second is referred to as the Allowance for Uncollectible Accounts ("Allowance") method.[34] Aureon applied the Allowance method to calculate its CEA revenue requirement.

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[32] *See* Exhibit 70, attached hereto.

[33] *See* Supplemental Declaration of Jeff Schill ¶ 2 ("J. Schill Supp. Decl."), attached hereto as Exhibit 73.

[34] *Id.*

The Direct Write-off method recognizes bad debt expense when the account receivable is deemed to be uncollectible and written off the books.[35] No allowance for estimates of bad debts is provided for under this method.[36] Under the direct write-off method, there is a potential for overstating income in the year of sale and understating income in a subsequent year when previously recorded receivables are deemed uncollectible.[37]

Under the second method for recording uncollectible amounts, Generally Accepted Accounting Principles ("GAAP") require the use of an allowance, or "loss contingency," for reporting potential bad debts at the time of sale.[38] Under the Allowance method, an estimate of uncollectible accounts or bad debts is reported during the financial period being presented in order to match the timing for the recording of receivables (revenues) and potential uncollectibles (expense).[39] The impact on income is immediate, which prevents the overstatement of income in one period, and the understatement of income (recognition of bad debt expense) in a subsequent period.[40] Expenses are recognized upon the assumption of an uncollectible receivable account (bad debt) even though the receivable may not be written off until a future period.[41] During this period of uncertainty, a business or company is provided an opportunity to collect the account that

[35] *Id.* ¶ 3.

[36] *Id.*

[37] *Id.*

[38] *Id.* ¶ 4; *See also* GAAP Accounting Standard Section 450-20-25-2, attached hereto as Exhibit 76.

[39] J. Schill Supp. Decl. ¶ 4.

[40] *Id.*

[41] *Id.*

was previously assumed to be uncollectible through various collection mechanisms, such as through a collection agency or by filing an action in court.[42]

Furthermore, Section 32.1171 of the Commission's rules recognized the Allowance method in GAAP, and adopted the that method for the treatment of uncollectible amounts. Section 32.1171(a) states as follows:

> Section 32.1171 - Allowance for doubtful accounts.
>
> (a) This account shall be credited with amounts charged to Accounts 5300, Uncollectible revenue, and 6790, Provision for uncollectible notes receivable to provide for uncollectible amounts related to accounts receivable and notes receivable included in Account 1170, Receivables. There shall also be credited to this account amounts collected which previously had been written off through charges to this account and credits to Account 1170. There shall be charged to this account any amounts covered thereby which have been found to be impracticable of collection.

The FCC has recognized that it is appropriate for carriers to utilize the Allowance method to account for uncollectibles, and to include those amounts in their revenue requirement. The Commission's ratemaking policies "account for interstate uncollectibles and provide for their recovery through interstate access charges. . . . An increase in uncollectibles will result in higher rates the following year."[43]

It is important to note that AT&T's own financial disclosures state that AT&T's management uses the same GAAP standards that Aureon followed to make "estimates and assumptions" regarding probable losses,[44] such as uncollectibles. Just as AT&T has done, Aureon followed the Allowance method in recording uncollectibles as permitted under GAAP and the

[42] *Id*.

[43] *National Exchange Carrier Association*, Order, 17 FCC Rcd. 22595, 22596, ¶ 3 (2002); *Madison River Telephone Co., LLC*, Order, 17 FCC Rcd. 23929, 23930, ¶ 3 (2002) (same); *Iowa Telecommunications Services, Inc.*, Order, 17 FCC Rcd. 17246, 17246 ¶ 3 (2002) (same).

[44] *See* Excerpt from AT&T's 2016 Annual Report, attached hereto as Exhibit 74.

FCC's rules, and Aureon appropriately included those amounts in its revenue requirement to recover losses through its CEA rate.

IV. Conclusion

WHEREFORE, for the foregoing reasons, in ruling upon this primary jurisdiction referral, Aureon respectfully requests that the Commission advise the U.S. District Court that AT&T is obligated to pay Aureon's tariff rates (plus late payment penalties and attorneys' fees) because those tariff rates are effective, just, reasonable, and lawful. Aureon further requests that the Commission confirm to the U.S. District Court that, consistent with the Fifth Circuit's decision in *CenturyTel v. Sprint*, 861. F.3d 566, AT&T's failure to pay the undisputed portions of Aureon's invoices was an unreasonable practice that violated Section 201(b) of the Communications Act. Finally, Aureon requests that the Commission deny AT&T's Formal Complaint.

Respectfully submitted,

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Dated: August 21, 2017

TABLE OF EXHIBITS

PUBLIC VERSION

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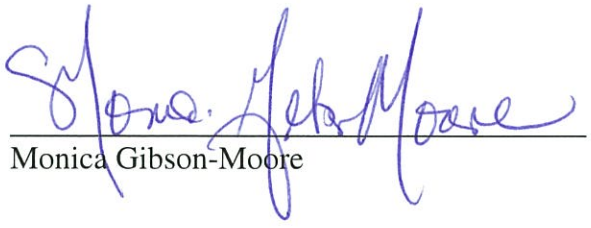

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